Supreme Court, U.S.
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No. 99-1065

In The

Supreme Court of the United States

D. BARRY SUTTON,

Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.; BELLSOUTH TELECOMMUNICATIONS, INC. COMPETITIVE MANAGEMENT RESTAFFING PLAN; ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The factual summary as stated by Petitioner under the heading "Question Presented" is incorrect in two material respects. First, the Petitioner was not selected for termination "under the express terms of an ERISA welfare benefit plan." The ERISA welfare plan in question does *not* specify the manner by which employees are selected for termination, but instead merely states that some procedure selected by the participating company will be used for that purpose. (App. 85) Second, the individual employees sued by Petitioner who rated his skills, and therefore were responsible for the ranking that led to his termination, are *not* designated as fiduciaries by the ERISA plan. In contrast, only those responsible for the administration of the severance benefit plan are identified as fiduciaries. (App. 90)

PARTIES

The parent corporation of Respondent BellSouth Telecommunications, Inc. is BellSouth Corporation, a publicly traded company.

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STATEMENT OF THE CASE

The statement of the case submitted by the Petitioner omitted or misstated the following material facts.

Mr. Sutton's employment was terminated in July of 1997 as part of the effort of BellSouth Telecommunications, Inc. ("BellSouth" or "the Company") to restaff a limited number of its senior management positions to allow the Company to compete in the increasingly competitive telecommunications industry. Mr. Sutton was offered, and accepted, approximately $200,000.00 in severance benefits under the Competitive Management Restaffing Plan ("CMRP" or "the Plan"). There is no dispute that Mr. Sutton received all of the benefits that he is entitled to under CMRP.

Contrary to Petitioner's allegations, the CMRP plan document does *not* specify the procedures that will be used to rate employees for the purpose of determining who will be terminated, but instead makes only general reference to the fact that a separate evaluation procedure will be used for that purpose. (App. 85) Petitioner's factual statement also claims that BellSouth's Vice President of Human Resources, Rebecca Dunn, was "administering the Plan" when she allegedly made statements that a fair process would be used to rate and rank employees for separation, and when she sent a memorandum to the Company's officers that, among other things, identified the process that would be used. These conclusory statements are not supported by the record in this case, or by the facts as determined by the District Court and Court of Appeals. In contrast, both courts found, as an undisputed matter of fact, that the process used to rate and rank

employees for termination ("MPEP" or "the Panel Process") was separate and distinct from the CMRP severance plan.[1] (App. 5-6, 17-19)

REASONS FOR DENYING THE PETITION

I. The Court of Appeals Properly Held That ERISA Does Not Provide a Cause of Action for Petitioner to Challenge the Termination of His Employment.

Petitioner's complaint in this action is that BellSouth and the individuals who rated him treated him unfairly in deciding that he should be terminated. He claims that BellSouth should not have included his business unit in the group of employees considered for separation, and that the Panel Process was unfair because he was evaluated by individuals who had insufficient knowledge of his work. Significantly, however, Mr. Sutton does *not* allege that he was denied severance benefits under CMRP, the ERISA plan which he alleges creates a basis for relief. Petitioner's claim, therefore, does not involve a denial or loss of benefits and does not implicate ERISA.

In contrast to the types of claims that arise under ERISA, the allegations raised by Petitioner are typical of the type of allegations asserted in wrongful discharge actions. It is well settled that there is no cause of action in Georgia for the wrongful discharge of an at-will

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[1] Petitioner also claims that the responses he received to the claim and appeal that he filed under the Plan were "not responsive" to the issues he raised. Although this contention is factually wrong, it is not material to the issue before the Court.

employee such as Mr. Sutton. *Borden v. Johnson*, 395 S.E. 2d 628 (Ga. Ct. App. 1990); *White v. I.T.T. Corp.*, 718 F.2d 994 (11th Cir. 1983). The Court of Appeals therefore correctly held that ERISA does not provide a cause of action for Petitioner to pursue a wrongful discharge claim.[2] That decision is consistent with the decisions of this Court and other Courts of Appeals and is supported by substantial record evidence.

A. There Is No Conflict Between the Decision of the Court of Appeals and This Court's Decision in *Varity Corporation v. Howe*.

In *Varity Corporation v. Howe*, 516 U.S. 489 (1996), the Court held that an employer was acting as a fiduciary when it knowingly and significantly deceived ERISA plan participants to change employers and to withdraw from certain ERISA benefit plans by misrepresenting to them that the new company had a "bright future" and that their benefits would remain secure. Among other things, the employer held a meeting in which it assured employees both orally and in writing that the security of their benefits would not be affected if they chose to transfer to the new company. The employer engaged in this trickery with knowledge that the new employer was insolvent, for the purpose of saving money at the expense

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[2] The only cause of action under ERISA for wrongful termination of employment arises under § 510 of the statute, which is not at issue in this case. That section makes it unlawful for an employer to discharge an employee for exercising rights under an ERISA plan or to prevent the exercise of such rights. 29 U.S.C.A. § 1140 (West, 1999).

of the plan participants. As a result of this deliberate deception, the participants lost their ERISA benefits.

The Court recognized that ERISA permits an employer to act as a plan administrator, as Varity did. 516 U.S. at 498. The Court emphasized, however, that not all of Varity's business activities involved plan administration, and it was therefore necessary to determine whether Varity was wearing its fiduciary "hat" or merely its employer "hat" when it made the representations to employees. *Id.* In concluding that Varity was acting as a fiduciary, the Court relied on the district court's findings that the key meeting in which the information was provided focused on ERISA plan benefits, and that the basic message conveyed to employees was that transferring to the new employer would not significantly undermine the security of those benefits. 516 U.S. at 501. In holding that Varity was acting as a fiduciary, the Court observed that conveying information about the likely future of plan benefits, and providing detailed information to participants to help them to decide whether to remain with the plans, was the type of "plan-related activity" in which fiduciaries regularly engage. 516 U.S. at 503.

The *Varity* holding, therefore, turned on the fact that the employer made misrepresentations regarding the security of the employees' ERISA plan benefits, with the intent of causing the plaintiffs to lose those benefits, and upon which the plaintiffs relied to their detriment. In this case, by contrast, the harm alleged by the Petitioner does not involve ERISA benefits at all. Instead, the damage Petitioner claims is that he lost his *employment* as a result of the alleged failure of BellSouth to follow fair procedures in selecting him for termination. The Court of

Appeals therefore correctly held, consistent with *Varity*, that BellSouth was acting in its corporate managerial capacity, and not a fiduciary capacity, when it terminated Mr. Sutton's employment.

B. There Is No Conflict with the Decisions of Other Courts of Appeals.

The Eleventh Circuit's decision is in accord with the decision of the Fourth Circuit in *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir. 1989). The plaintiff in that case was discharged for cause and thereafter applied for benefits under a plan which authorized pension payments only when both the employer and employee considered retirement to be in their best interests. The plaintiff's application for benefits was denied, and he then appealed the decision internally. When his internal appeal was likewise denied, plaintiff filed suit. The district court granted the defendant's motion to dismiss for failure to state a claim. In affirming that decision, the Fourth Circuit stated:

> We reject appellant's attempt to transform the provisions of this early retirement plan into a forum for a wrongful discharge action. . . . An employee's discharge may properly be litigated pursuant to Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the relevant collective bargaining agreement, or exceptions to the employee-at-will doctrine. If there is a wrongful discharge, the remedial provisions of the foregoing actions may well encompass an award of benefits. To subject employers to a potential waterfall of wrongful discharge actions, by permitting plan

> participants to litigate the correctness of their discharge through the "full and fair review" provision of ERISA, would discourage employers from instituting early retirement plans, which ERISA does not require.

875 F.2d at 1078 (citations omitted); *see also Berger v. Edgewater Steel Co.*, 911 F.2d 911, 918 (3d Cir. 1990) ("[I]n making the decision as to whether the Employees' retirements were in the company's interest, Edgewater was acting in its capacity as employer and not as a fiduciary under ERISA").

As the Fourth Circuit's analysis in *Dzinglski* demonstrates, policy considerations do not support Petitioner's contention that he should be permitted to pursue this novel legal theory. This Court has instructed that "courts must always bear in mind the ultimate consideration whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 158 (1985) (Brennan, J., concurring). In this case, Petitioner does not allege that he lost any ERISA benefits or that BellSouth mismanaged the Plan or its assets. Instead, he has simply tried to dress up a wrongful discharge claim in ERISA clothing. Allowing Petitioner to pursue such a claim would substantially undermine, rather than further, the purposes of ERISA. Under Mr. Sutton's theory, BellSouth is liable to him under ERISA solely by virtue of the fact that BellSouth selected employees for termination by using a formal evaluation procedure and providing severance benefits to terminated employees. Simply stated, if BellSouth had not established CMRP, and had terminated Petitioner with *no*

severance benefits, he would have no cause of action under ERISA. It defies logic – and undoubtedly would discourage the establishment of severance plans – if by *providing* severance benefits to Mr. Sutton, liability for his discharge was created where none would otherwise exist.

The ability to hire or fire an individual is at the heart of the employer-employee relationship. In determining that a skills deficiency existed and in designating Mr. Sutton for separation, BellSouth acted in that capacity, and not as a fiduciary. Accordingly, Petitioner's claims for breach of fiduciary duty were properly dismissed.[3]

C. There Is Substantial Evidence to Support the Decision of the Court of Appeals.

The District Court determined, as an undisputed matter of fact, that the rating process used to evaluate employees to determine who would be separated (the Panel Process) was distinct from the severance plan (CMRP) that provided benefits to terminated employees. The Court's finding on this issue was based on substantial record evidence, including the following undisputed facts:

1. Employees selected for termination under the Panel Process (or otherwise) were not required to participate in CMRP. Those selected could elect not to participate and

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[3] Respondents do not dispute that Petitioners Killian and Dunn perform certain fiduciary functions under CMRP and that the CMRP Review Committee also performs fiduciary functions under the Plan. Those functions, however, are not implicated in this case.

sign a release, in which case they were terminated without Plan benefits. (App. 17)

2. The CMRP plan document does not describe *or even reference* the Panel Process. The Plan instead states that "an evaluation procedure selected by the Participating Company" will be used to rate and rank the overall effectiveness of managers. (App. 85) This language emphasizes that those involved in making *employment* decisions (i.e., the Participating Companies) and *not* the Plan fiduciaries are responsible for determining the process used for terminating employees. (App. 18-19)

3. The CMRP plan document specifically states that it is the "full text" of the Plan. (App. 95) Whereas the Plan specifically incorporates by reference the election and release form (App. 89), it makes no such reference – or any reference whatsoever – to the Panel Process, further supporting the Court's finding that the selection process is distinct from CMRP. (App. 19)

The record evidence and applicable law also support the decision of the Court of Appeals and the District Court that the memorandum sent to the Company's officers by Rebecca Dunn, Vice President of Human Resources, announcing the CMRP plan was insufficient to "incorporate" the Panel Process into the Plan. ERISA prohibits both oral and informal written amendments to employee benefit plans. *See, e.g., Nachwalter v. Christie,* 805 F.2d 956 (11th Cir. 1986). It is undisputed that the Dunn memorandum was not a formal plan amendment, and the lower courts therefore properly held that memo

did not make the Panel Process part of the ERISA severance plan. (App. 5, 18)

CONCLUSION

The Court of Appeals properly held that neither *Varity*, nor any other case law, supports Petitioner's novel theory of recovery. ERISA does not provide a cause of action for an employee to challenge the termination of his employment. In contrast, the purpose of ERISA is to protect employee benefits, and Petitioner has neither alleged nor suffered any harm with respect to benefits under any ERISA plan. Respondents therefore respectfully request that the petition be denied.

Respectfully submitted,

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